

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 555 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BHARAT KUMAR TRIBHOVANDAS

Versus

STATE OF GUJARAT

Appearance:

MR VIJAY H PATEL for Petitioner

Mr. P.B. Bhatt, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 27 /01/98

ORAL JUDGEMENT

By means of filing this appeal under Section 374(2) of the Code of Criminal Procedure, 1973, ('Code' for short), the appellant has challenged the judgment and order dated April 6, 1995, rendered by the learned Additional Sessions Judge, Kheda, Camp at Anand, in Sessions Case No.242 of 1992, whereby the appellant came to be convicted for the offences punishable under Section 306, 498-A and 323 of the Indian Penal Code , and

sentenced to undergo rigorous imprisonment of five years and fine of Rs.500/-, in default, R.I. for 15 days for the offence under Section 306, R.I. for two years and fine of Rs.500, in default, R.I. for 15 days for the offence under Section 498-A, and sentence for 15 days and fine of Rs.100/-, in default, R.I. for 7 days for the offence under Section 323 of the Indian Penal Code.

Briefly stated, the prosecution case is that the appellant married Monaben (since deceased) on February 8, 1985. As per the prosecution case, the appellant was treating the deceased with cruelty and used to beat her. It is also further alleged that the appellant was suspecting the character of the deceased and, therefore, the deceased used to remain under the constant torture. It is further the prosecution case that on October 1, 1992, the appellant treated the deceased with cruelty and beaten her. On the same day, at about 8 p.m. the appellant again raised doubts about the character of the deceased and caused injury on her, as a result of which, the deceased poured kerosene on her body and set her body ablaze. The appellant, thereafter, tried to rescue the deceased and, in that process, the appellant also sustained burn injuries. Both, the appellant and the deceased, were taken to the Anand General Hospital, where, both were admitted as 'indoor patients'. The police officer, who was on duty at the General Hospital, Anand, sent a yadi to Anand Town Police Station about the burn injuries sustained by two persons, which was received by the Police Sub-Inspector, Mr. K.M. Polara. PSI, Mr. Polara, immediately came to the hospital and recorded complaint of the deceased Monaben. PSI, Mr. Polara, sent yadi to the Executive Magistrate, Mr. Patanwadia, to record statement of the deceased. Executive Magistrate, Mr. Patanwadia, recorded the statement, which has become dying declaration of the deceased. The statement of the appellant was also recorded by the Executive Magistrate in the Anand General Hospital. The deceased, Monaben, succumbed to the burn injuries around 1.40 a.m. After death of Monaben, PSI, Mr. Polara, lodged complaint against the appellant at Anand Police Station. The investigation of the offence was handed over to PSI, Mr. Polara, who held inquest on the dead body of the deceased. PSI, Mr. Polara, drew panchanama of the place of occurrence and recovered incriminating articles. After death of Monaben, her father, Shantilal, mother Labhuben, brother Jairaj and sister Damini had come from Ahmedabad to the Anand General Hospital. PSI, Mr. Polara, recorded their statements on October 2, 1990. When the appellant was discharged from the hospital, he was arrested. PSI, Mr.

Polara, also recorded statement of the office bearer of Shree Kanta Narivikas Gruh, Rajkot, and collected various documents from that Institution. After receipt of post-mortem report and the report of the Forensic Science Laboratory, and at the conclusion of the investigation, PSI, Mr. Polara, submitted chargesheet against the appellant in the court of the learned Judicial Magistrate, First Class, at Anand, which was registered as Criminal Case No.242 of 1992. As the offence punishable under Section 306 was exclusively triable by the Sessions Court, the case was committed to the Sessions Court for trial.

Charge, Exh.3, was framed against the appellant for the offences punishable under Sections 306, 398, 323 of the Indian Penal Code. The charge was read over and explained to the appellant. The appellant pleaded not guilty to the charge and claimed to be tried.

To prove the case against the appellant, the prosecution examined the following witnesses.

- (1) Dr. Chambaklal Uchavilal P.W.1, Exh.7
- (2) Executive Magistrate, Mr. R.D. Patanwadia P.W.2, Exh.17
- (3) Harshadkumar Premshanker Dave P.W.3, Exh.20
- (4) Daminiben Shantilal P.W.4, Exh.22
- (5) Dr. Sushilaben Keshavlal Sheth P.W.5, Exh.27
- (6) Shantilal Narandas P.W.6, Exh.33
- (7) I.O., PSI, Mr. K.M. Polara P.W.8, Exh.51

The prosecution, in support of its case, produced documentary evidence, mainly consisting of complaint of PSI, Mr. Polara, dying declaration recorded by Executive Magistrate, Mr. Patanwadia, inquest panchanama, post-mortem notes, panchanama of scene of offence, documents of Shree Kanta Narivikas Gruh, Rajkot, report of the FSL, certified copy of the judgment and order of the learned Metropolitan Magistrate, Ahmedabad, in Criminal Misc. Application No.54 of 1987, which was filed by the deceased against the appellant for maintenance, etc.

After recording of evidence of the prosecution witnesses was over, the appellant was questioned generally and his statement came to be recorded under Section 313 of the Code of Criminal Procedure. In his statement, the appellant denied his involvement in the offence and came out with the defence that his sister-in-law, Damini, (sister of the deceased), had come to his place at 7 p.m. and the appellant had driven her out from his house while insulting her and, therefore,

the deceased got excited and poured kerosene on her body. The appellant stated that Damini was not of good character and, therefore, he did not like her visiting his house and, therefore, he insulted her and driven her out. The appellant denied that he used to take drinks and on the day of the incident also, he had consumed liquor. He further stated that, when the deceased set her body on fire, he tried to rescue her and, therefore, he sustained burn injuries.

The learned Additional Sessions Judge, after hearing arguments of the learned advocates and after appreciation of oral as well as documentary evidence, came to the conclusion that dying declaration recorded by the Executive Magistrate was genuine and the deceased had committed suicide due to cruelty meted out to her by the appellant. The learned Additional Sessions Judge has also held that, before the deceased set her body on fire, there was a scuffle and the appellant had beaten her. It is also held by the learned Additional Sessions Judge that the appellant used to treat the deceased with cruelty, which had led her to commit suicide. In view of the aforesaid findings, the learned Additional Sessions Judge has convicted the appellant of the offences punishable under Section 306, 498-A and 323 of the Indian Penal Code, and imposed the sentence, which is referred to earlier, which has given rise to the present appeal by the appellant.

The learned advocate, Mr. V.H. Patel, appearing for the appellant, has strenuously urged that sanctity of the dying declaration recorded by the Executive Magistrate, Mr. Patanwadia, requires to be scrutinized carefully. It is further submitted that, during recording of the dying declaration, the sister of the deceased, namely, Damini, was present and, on her instigation, the deceased had given dying declaration. It is further submitted by the learned advocate for the appellant that, before recording dying declaration, no certificate was obtained from the Medical Officer regarding physical condition of the deceased. It is further submitted by the learned advocate for the appellant that the deceased had sustained serious burn injuries and she was not in a fit state of mind to give statement. It is the submission of the learned advocate for the appellant that the deceased was a sensitive lady and, due to her sensitive nature, she had committed suicide, as the appellant had driven her sister out of his house. It is further submitted that the appellant himself had sustained burn injuries, when he tried to save the life of the deceased. It is further submitted

by the learned advocate for the appellant that the evidence led by the prosecution was, highly, doubtful and the benefit of doubt should be given to the appellant and this appeal be allowed.

On the other hand, it is submitted by learned Additional Public Prosecutor, Mr. P. B. Bhatt, that the appellant was constantly torturing and causing cruelty on the deceased by doubting her character. It is further submitted that, at the time of the incident, the deceased was pregnant and, in spite of that fact, the appellant tortured her, beaten her, and compelled her to commit suicide. The learned APP has further submitted that, when the dying declaration was recorded, the Executive Magistrate had taken care that no relative of the deceased was present in the nearby vicinity. It is further submitted that the dying declaration was genuine and the learned Additional Sessions Judge has not committed error in placing reliance on the dying declaration. It is further submitted by the learned APP that the appellant used to consume alcohol heavily and, on the day of the incident also, he was heavily drunk and had caused torture, abused the deceased and had beaten her, which had led her to commit suicide. It is further submitted that the prosecution proved its case beyond reasonable doubt and, therefore, the appeal requires to be dismissed.

The submission of the learned advocate for the appellant that the dying declaration is not truthful and it was recorded by the Executive Magistrate in presence of the sister of the deceased, is devoid of any merit. The Executive Magistrate, Mr. Patanwadia, P.W.2, in his deposition, has specifically stated that, at the time of recording the statement, he had asked all the relatives of the deceased to go out of the room. In this connection, it would be pertinent to note that, in the dying declaration, Exh.19, the Executive Magistrate had obtained endorsement of the Doctor at 11.25 p.m. and the deceased was fully conscious and both the thumb impression of the right hand was taken in his presence. This evidence, which is led by the prosecution, proves that the deceased was in a fit state of mind and was fully conscious and was able to give her statement before the Executive Magistrate. The deceased, in her dying declaration, had specifically stated that, on the day of the incident at about 8 p.m, the appellant had come to the house in the drunken condition and had abused her. The deceased also stated that the appellant made accusation that she was having affairs with other persons and thereafter beaten her. The deceased also stated in

her dying declaration that the appellant was suspecting that their daughter, Umangi, was not of him. In the dying declaration, the deceased specifically stated that she had set her body on fire because of the torture and beating by the appellant. She also expressed and desired in the dying declaration that her daughter, Umangi, should be kept with her parents, who will look after her welfare.

Before appreciating the evidence of the witnesses and the contents of dying declaration, it would be relevant to note the law relating to dying declaration. Section 32(1) of the Indian Evidence Act, 1872, is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under section 32 when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstance leading to his death. The general principle on which this species of evidence is admitted that they are declarations made in extremity, when the person is at point of death and when every hope this world is gone. At that point of time, every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes very important and reliable piece of

evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Courts have to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. It is also well settled that it is not necessary that recording of dying declaration should be in the form of question and answer. The persons making dying declaration need not make elaborate and exhaustive statement as to cover each and every aspect of the incident, more so, where the deceased-declarant was, at that time, suffering from high degree of burns and was under severe stress and agony. The Supreme Court has emphasized that shortness of the statement itself guarantees truth. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true:

- (1) Was the victim in a position to identify the assailant/s?
- (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities?
- (3) Whether any material part is proved to be false by other reliable evidence?

(See: (1) Khushal Rao v. State of Bombay (1958) SCR 552; (2) Tarachand Damu Sutar vs. State of Maharashtra (1962) 2 SCR 775; (3) Kusa and ors. vs. State of Orissa, (1980) 2 SCC 207; (4) Meesala Kundula Bala Subrahmaniyam and another v. State of A.P. (1993) 2 SCC 684; (5) Meesala Ramkrishna vs. State of A.P., (1994) 4 SCC 181; (6) Goverdhan Raoji Ghyare vs. State of Maharashtra, 1993 Suppl. 4 SCC 316; (7) Gangotri Singh v. State of U.P., 1993 Suppl. 1 SCC 387, (8) Smt. Paniben vs. State of Gujarat, AIR 1992 SC 1817; (9) State of Rajasthan v. Kishore, JT 1996 (2) SC 595; and (10) State of U.P. vs. Ameer Ali, JT

In the light of the above principles, the dying declaration in the instant case made by the deceased requires to be appreciated. P.W. 2, Patanwadia, Executive Magistrate, who recorded dying declaration (Exh.19) specifically deposed that, when he reached the hospital, he asserted from the Doctor, who was treating the deceased, about the physical condition of the deceased, and he was informed that the deceased was in a fit state of mind to give statement. His testimony further shows that, thereafter, he started recording the statement. In cross examination, suggestion was made to the witness that, when he recorded the statement, another lady, i.e., the sister of the deceased, was present. But, the witness has categorically denied the suggestion that, when he recorded the dying declaration, the sister of the deceased was present. It has also come in the evidence of the Executive Magistrate that, after completing recording of dying declaration, he had obtained endorsement of the Doctor that the deceased was fully conscious and was in a fit state of mind when he completed recording of the statement. Therefore, there cannot be any hesitation in coming to the conclusion that, when the Executive Magistrate recorded the dying declaration, the deceased was fully conscious and in a fit state of mind to give the true version as to how the incident had taken place.

P.W. 8, PSI, Mr. Polara, who was at the relevant time discharging his duties at the Anand Police Station, had also recorded the complaint of the deceased at 22.35 hrs. in the Anand General Hospital. The complaint had become dying declaration under Section 32(1) of the Act. PSI, Mr. Polara, in his oral evidence, stated that, after receiving information that one lady was serious due to burn injuries at the Anand General Hospital, he reached the hospital and recorded the complaint of the deceased between 22.35 hrs. and 23 hrs. The complaint was recorded, before the Executive Magistrate had recorded dying declaration of the deceased. The complaint, which had become dying declaration, recorded by PSI, Mr. Polara, is produced at Exh.54. In the complaint (Exh.54) also, the deceased had stated that, on the day of the incident, the appellant had come at 8 p.m. to the house and he was heavily drunk. The appellant started abusing and beating her by making accusation that she was of bad character. She further stated in the complaint that the appellant had told her that she was having affairs with four other persons and the child, which she was carrying in her womb, was not of

him. She further stated that she had poured kerosene on her body and ignited match stick. In the complaint, she also stated that the appellant also received burn injuries as he was beating her. If the dying declaration (Exh.19) and the complaint (Exh.54), which had also become dying declaration, are compared, then it becomes clear that, when the deceased was admitted in the hospital, she was conscious and she had narrated before the Investigating Officer as well as the Executive Magistrate that she was ill-treated by the appellant and the appellant had also accused her of infidelity. Reading two dying declarations, it becomes clear that, due to harassment and cruelty and beating by the appellant, the deceased was compelled to commit suicide. It should not be forgotten that, when the deceased committed suicide, she was carrying child, and the pregnancy was of two months. Normally, a woman, who is pregnant, would not like to commit suicide unless she was fed up and forced to commit suicide by the cruel treatment meted out to her by her husband.

The deceased had run away from her matrimonial home in the year 1986 which fact is borne out from the evidence of P.W. 5, Dr. Sushilaben Keshavlal Sheth, who was the Honorary Secretary of Shree Kanta Narivikas Gruh, Rajkot. In her deposition, she has stated that the deceased Monaben had come to her Institution on February 22, 1986 at about 9 p.m. and she had given statement, which is produced at Exh.28. In the statement Exh.28 also, the deceased had stated that she had left her matrimonial home because of the torture meted out to her by the appellant. In her evidence, Dr. Sushilaben stated that, after the deceased gave address of her parents, the appellant and other relatives were called at Rajkot. The witness had advised the relatives not to send the deceased to her matrimonial home, as she was treated with cruelty by the appellant. It is further deposed by the witness that, after much persuasion, she allowed the deceased to be taken by the relatives on their giving assurance that she would not be sent to her matrimonial home. The evidence of Dr. Sushilaben, P.W.5., and statement of the deceased, recorded by Dr. Sushilaben, produced at Exh.28, proves beyond doubt that the appellant suspected that the deceased was of bad character and used to treat her with cruelty, as a result of which she had left her matrimonial home in the year 1986. The evidence of the father of the deceased, Shantilal, P.W.6, and the evidence of the sister of the deceased, Daminiben, P.W. 4., also support the prosecution case that the appellant used to treat the deceased with cruelty, which had led her to commit suicide. It has come in the evidence of Daminiben that

they reached the hospital after the deceased had expired. Therefore, there is no substance in the argument of the learned advocate for the appellant that, when the Executive Magistrate recorded the dying declaration, Daminiben was present, and, on her instigation, the deceased had given false version of the incident. The submission of the learned counsel for the appellant that no endorsement of the Medical Officer was obtained on the complaint and before recording of dying declaration, is also devoid of any merit. It is significant to note that, at the relevant time, PSI, Mr. Polara, was recording complaint of injured Monaben and not recording her dying declaration. As noted earlier, perusal of the answers given by the injured Monaben to PSI, Mr. Polara, indicates and inspires to believe that she was conscious and had given direct answer to the questions put by PSI, Mr. Polara, from which, it can easily be inferred that she was mentally in a fit condition. The submission of the learned advocate for the appellant that, before recording statement, endorsement of the Doctor about consciousness of the deceased was not obtained, is also meritless. P.W. 2, Mr. Patanwadia, in his evidence, has categorically stated that, after reaching the hospital, he had met the doctor, who was treating the deceased, and had ascertained that the deceased was conscious and in a fit state of mind to give her statement. Even after completing recording of statement, the deceased was conscious and, therefore, the Doctor in-charge had made endorsement below the dying declaration that the patient was fully conscious and both thumb impressions of her right hand were taken in his presence. Admittedly, the deceased had expired around 1.30 a.m. on the next day, whereas the dying declaration was completed at 23.25 hrs.

Having regard to the contents of two dying declarations, it is clear that the accused had abetted, led and forced the deceased to commit suicide because of ill-treatment and cruelty meted out to her. The fact that the deceased had left her matrimonial home in the year 1986 also corroborates the prosecution case that the appellant was in the habit of treating the accused with cruelty by accusing her of bad character about having affairs with some other person. The medical certificate, Exh.9, and the post-mortem notes, Exh.12, clearly establish that external injuries, other than burn injuries, were found on person of the deceased. This piece of evidence proves that the appellant had caused injuries on the deceased by beating before she committed suicide. Therefore, in my opinion, the conviction recorded and the sentence imposed by the learned Additional Sessions Judge does not call for any

interference in this appeal.

As a result of foregoing reasons, the appeal fails and is hereby dismissed. The conviction recorded and sentence imposed by the learned Additional Sessions Judge, Kheda, Camp at Anand, in Sessions Case No.242 of 1992, vide judgment and order dated April 6, 1995, for the offences punishable under Section 306, 498-A and 323 of the Indian Penal Code, against the appellant, is confirmed. Muddamal be destroyed as per the directions contained in the judgment of the learned Additional Sessions Judge.

(swamy)